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No. 77-1074

In the Supreme Court of the United States

OCTOBER TERM, 1977

AFFLIATED UTE CITIZENS OF THE STATE OF UTAH, AN UNINCORPORATED ASSOCIATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The order of the Court of Claims dated October 28, 1977 (Pet. App. A-1) is noted at 566 F. 2d 1191. An earlier order of the Court of Claims, dated October 20, 1972 (Pet. App. A-5), is reported at 199 Ct. Cl. 1004.

JURISDICTION

The judgment of the Court of Claims was entered on October 28, 1977. On January 30, 1978, Mr. Justice Brennan granted an extension of time in which to file a petition for a writ of certiorari to and including January 31, 1978. The petition was filed on January 30, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the record supports the determination of the Court of Claims that petitioners' action was barred by the statute of limitations.

STATUTES AND REGULATION INVOLVED

The Ute Termination Act of 1954, 68 Stat. 868, 25 U.S.C. 677 *et seq.* is reproduced in the appendix to the petition at pages A-9 through A-26.

28 U.S.C. 2501 provides:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

The Ute Termination Proclamation of 1961, 26 Fed. Reg. 8042, promulgated by the Secretary of the Interior, provides:

> Pursuant to the authority contained in section 23 of the Act of August 27, 1954 (68 Stat. 877, as amended, 25 U.S.C. 677v), it is hereby proclaimed that the Federal restrictions on the property of each individual mixed-blood member of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah having been removed, the Federal trust relationship to such individual is terminated and that effective midnight, August 27, 1961, such individual shall not be entitled to any of the services performed for Indians because of his status as an Indian. All statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to such member over which supervision has been terminated, and the laws of the several States shall apply to such member in the same manner as they apply to other citizens within their jurisdiction.

STATEMENT

Petitioners, mixed-blood Ute Indians, filed this suit in the Court of Claims on March 14, 1969. The complaint set forth claims against the United States based on its management of tangible and intangible property that allegedly remained in a federal trust or restricted status after promulgation of the Ute Termination Proclamation of 1961, 26 Fed. Reg. 8042. The Proclamation was issued pursuant to the Ute Termination Act of August 27, 1954, 68 Stat. 868.

Section 1 of the Ute Termination Act stated that the purpose of the Act was, in pertinent part, "to provide for the partition and distribution of the assets of the Ute Indian Tribe * * * between the mixed-blood and full-blood members thereof; [and] for the termination of Federal supervision over the trust, and restricted property, of the mixed-blood members of said tribe * * *." Section 8 of the Act called for preparation of the rolls of full-blood and mixed-blood members and provided that those rolls, after disposition of appeals, would be final. Section 5 provided that on publication of the final rolls, "the tribe shall thereafter consist exclusively of full-blood members." When the rolls were published in 1956 (21 Fed. Reg. 2208), the mixed-blood petitioners were thus removed from tribal status.

The Termination Proclamation, mandated by Section 23 of the Act, was issued in August 1961. Pursuant to the statute, it declared that federal restrictions on the property of mixed-blood Utes had been removed and that the federal trust relationship with them was terminated. The Proclamation also ended their status as Indians for the purposes of federal law and subjected them to the laws of the various states in the same manner as other citizens.

On October 20, 1972, on the government's motion for summary judgment, the Court of Claims entered an order

(Pet. App. A-5) holding that petitioners' claims regarding tangible property (land, cash, and personal property) and intangible property (oil, gas, and mineral rights, plus unadjudicated and unliquidated claims against the United States) were barred by the six-year statute of limitations. The court held that these rights had been divided and distributed, and hence the petitioners' claims had accrued, by the time of the Termination Proclamation in August 1961.

The court said it was unable to determine on the basis of the existing record whether the statute of limitations also barred petitioners' claims with respect to water rights, fishing and hunting rights, and rights to future timber growth (Pet. App. A-7). The record left it unclear whether these rights had also been divided and distributed before 1961, the court said (*id.* at A-7 to A-8). The court therefore remanded that aspect of the case to the trial commissioner for development of a fuller record. In October 1976, the parties entered into a joint stipulation of facts and placed 32 exhibits into the record (see Pet. 8-9 and n. 16). Both parties then moved for summary judgment.

On October 28, 1977, the Court of Claims granted the government's motion for summary judgment and dismissed the petition before it (Pet. App. A-1). The court said it found "nothing in the record to shake our conviction that any acts for which the Federal Government might have been liable occurred by 1961, leaving plaintiffs' 1969 filing untimely" (Pet. App. A-2). The court stated that "[t]he division and distribution of assets of which plaintiffs complain were effected by 1961, all intangible assets being conveyed either in the form of shares in the Ute Distribution Corporation or as appurtenant to land, [and that] whatever claims plaintiffs may have had matured then and became barred by the statute of limitations in 1967" (*ibid.*). The court rejected petitioners' contention

that their claims did not mature until later, stating: "[W]hatever rights the mixed-bloods took were fixed in 1961, after which the Federal Government took no actions affecting the parties' division of assets" (*ibid.*).

The court found no support for petitioners' claim that they were unaware of the termination procedures or the consequences of those procedures. The record "leave[s] us no doubt that the mixed-bloods had notice of the finality of the termination procedures" (*ibid.*), the court said. The court concluded: "[P]laintiffs have pointed to no evidence, and we can find none ourselves, establishing a continued federal responsibility for claimed assets of the mixed-bloods beyond the time of the termination proclamation" (Pet. App. A-2 to A-3).

ARGUMENT

The decision of the Court of Claims is correct, depends largely on the particular facts of this case, and lacks general importance. It does not warrant review by this Court.

1. Petitioners' principal contention (Pet. 11-17) is that the Court of Claims, in determining that their claims were barred by the statute of limitations (28 U.S.C. 2501), misconstrued the stipulations of fact and certain provisions of the Ute Termination Act. These questions have no significance beyond the present case, but in any event there is ample support in the record for the conclusion that petitioners' claims were untimely.

The extensive stipulation of facts, as well as the accompanying exhibits, set out in detail the transactions relevant to termination of federal supervision over the mixed-blood Ute Indians. Although petitioners argued that these transactions demonstrated an enduring federal involvement with the intangible assets of the mixed-blood Utes after the 1961 proclamation, the Court of Claims

found that, by virtue of these transactions, "[t]he division and distribution of assets of which [petitioners] complain were effected by 1961, all intangible assets being conveyed either in the form of shares in the Ute Distribution Corporation or as appurtenant to land" (Pet. App. A-2). See, *e.g.*, Stipulation, pp. 22, 24, 30. Thus, the government was able to demonstrate from the stipulated record and exhibits that if petitioners had any rights to water, fishing, and hunting, these rights were appurtenant to the lands from which federal restrictions were removed prior to the 1961 Termination Proclamation, and that any interest petitioners had in the future growth of timber was disposed of in the division of assets prior to 1961. See Stipulation, pp. 25, 32, 35. Since the rights to those assets were fixed by 1961, petitioners were not entitled to base their claims on later federal actions not affecting those rights. The court could find "no evidence establishing a continued federal responsibility for claimed assets of the mixed-bloods beyond the time of the termination proclamation" (Pet. App. A-2 to A-3).

The legislative history of the Termination Act shows that the mixed-blood Utes desired the prompt termination of federal supervision. See *Ute Indian Tribe* v. *Probst*, 428 F. 2d 491, 498 (C.A. 10), certiorari denied, 400 U.S. 926; H.R. Rep. No. 2493, 83d Cong., 2d Sess. (1954). The record in this case similarly demonstrates that petitioners decided as early as 1958 to expedite the division of assets and the termination of federal restrictions on their property. See, *e.g.*, Exhibit 11. Prior to the Termination Proclamation in 1961, petitioners participated in the division of assets with full notice and knowledge of the termination of federal trust responsibility that was involved. See, *e.g.*, Exhibits 3, 4, 5.

Nothing in *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, is to the contrary. Indeed, the Court there

recognized that the 1961 Proclamation, "[t]o the extent the nature of the property so permitted, * * * marked the fulfillment of the purpose set forth in §1 of the Act, 25 U.S.C. §677, namely, the termination of federal supervision over the trust and restricted property of the mixed-bloods" (406 U.S. at 149-150).

2. Petitioners also assert (Pet. 14-15, 20-21, 23-24) that the decision below conflicts with decisions of this Court and the federal courts of appeals. The assertion is incorrect.

This Court in *Menominee Tribe* v. *United States*, 391 U.S. 404, did not hold that fishing and hunting rights are never appurtenant to land, but that the specific treaty rights of the Menominee Tribe had not been extinguished by the Menominee Indian Termination Act of 1954, 68 Stat. 250. No treaty rights are involved here. Petitioners are no longer tribal members, and their hunting and fishing rights were distributed as appurtenant to lands that were disposed of before termination. See, *e.g.*, Exhibits 26, 27 and 29. The record contains correspondence to petitioners from the Department of the Interior stating that their tribal hunting and fishing rights were to end on termination in 1961 and that any such rights would thereafter be subject to state law. See, *e.g.*, Exhibits 26, 29, 30.[1]

Nor does the decision below conflict with relevant decisions of other federal courts. In *Ute Indian Tribe* v. *Probst*, 428 F. 2d 491 (C.A. 10), certiorari denied, 400 U.S. 926, the court did not deal with the rights at issue here, but rather affirmed that the Termination Act gave the Ute Indian Tribe a right of first refusal on land sold by the mixed-bloods (428 F. 2d at 496). In *Crain* v. *First*

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[1]For the same reasons, the decision below does not conflict with *Kimball* v. *Callahan*, 493 F. 2d 564 (C.A. 9), certiorari denied, 419 U.S. 1019.

National Bank of Oregon, Portland, 324 F. 2d 532 (C.A. 9), the court concluded that the provisions of the Klamath Termination Act did not terminate all federal trust responsibility for the property of persons who (unlike petitioners here) remained tribal members (324 F. 2d at 533, 536). In *Klamath and Modoc Tribes* v. *United States*, 436 F. 2d 1008 (Ct. Cl.), certiorari denied, 404 U.S. 950, the court held that the United States could "accommodate its Indian enactments [including a termination act] within a short time, to changed circumstances" (436 F. 2d at 1021), a different matter from holding that federal supervision *must* be continued despite the provisions of a termination act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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